STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 24, 2014
v	No. 314681 Shiawassee Circuit Court
JEREMY WESLEY CLAY, Defendant-Appellant.	LC No. 12-003576-FC

Before: BORRELLO, P.J., and SERVITTO and BECKERING, JJ.

PER CURIAM.

Defendant, Jeremy Clay, appeals as of right from his jury convictions of two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a) (victim under 13 years of age), and two counts of CSC I, MCL 750.520b(1)(b)(*i*) (victim at least 13 but less than 16 years of age and a member of the same household). Pursuant to MCL 750.520b(2)(b)[1], the trial court sentenced defendant to 300 months (25 years) to 840 months in prison for his convictions under MCL 750.520b(1)(a). The trial court imposed concurrent sentences of 285 to 840 months in prison for defendant's convictions under MCL 750.520b(1)(b)(*i*). We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Prior to trial, defendant, against the advice of counsel, argued for the admission of several pieces of evidence. Defendant sought the admission of a doctor's report even though the trial court informed defendant that, if asked to rule on the issue, it would exclude certain portions of the report that contained statements by the victim. Defendant stated that he understood that his request was made against the advice of counsel; however, defendant wanted the victim's statements to be admitted because he believed them to be inconsistent with other statements made by the victim. In addition, defendant sought to be able to discuss a personal protection order (PPO) taken out by his wife, the victim's mother, against defendant. Defendant once again acknowledged that he was acting against the advice of counsel. Next, defense counsel indicated

[1] MCL 750.520b(2)(b) provides that a CSC I "violation that is committed by an individual 17 years of age or older against an individual less than 13 years of age" is punishable "by imprisonment for life or any term of years, but not less than 25 years."

that defendant did not want him to object to the admission of prior bad acts committed by defendant and did not want the trial court to apply the balancing test found in MRE 403 to the evidence. Once again, defendant's request was contrary to the advice of counsel. After hearing testimony concerning the other acts evidence outside the presence of the jury, defendant stated he wished for the testimony to be before the jury unabridged; the trial court subsequently admitted the evidence. In addition, defense counsel, at defendant's insistence, read the jury an opening statement that defendant prepared.

At trial, the victim testified that defendant engaged in sexual acts, including sexual intercourse, with her over the course of several years. In a recorded telephone call, defendant told the victim that he was sorry for engaging her in sexual intercourse and that it would not happen again. In addition, defendant wrote a letter to the victim apologizing and asking for a second chance. The victim's reports of sexual abuse were corroborated by the findings of Dr. Stephen Guertin.

Defendant testified and denied ever engaging in sexual activity of any kind with the victim. Defendant acknowledged that he wrote a letter of apology to the victim, but contended that he apologized to her for talking to her harshly, and not for any actions she alleged he committed. Defendant stated that he apologized to the victim during the recorded telephone call because medication he was taking made him think that perhaps he had done something to the victim.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that trial counsel rendered ineffective assistance by: (1) allowing the jury to view the videotaped interviews of the victim; (2) failing to request that only portions of the videotape be viewed as impeachment; (3) failing to redact portions of a report authored by Dr. Guertin; (4) failing to object to prior bad acts evidence; (5) reading the opening statement prepared by defendant; and (6) failing to redact portions of defendant's interview with police. Defendant asserts that defense counsel allowed himself to be bullied into making unreasonable strategic choices.

The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. A trial court's findings of fact, if any, are reviewed for clear error, while its constitutional determinations are reviewed de novo. *People v Dendel*, 481 Mich 114, 124; 748 NW2d 859 (2008), amended 481 Mich 1201 (2008). Defendant failed to move for a new trial or an evidentiary hearing in the trial court; therefore, this issue is not preserved and our review is limited to mistakes apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

To establish ineffective assistance of counsel, a defendant must show (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Strickland v Washington*, 466 US 668, 688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

Defendant specifically requested that the jury be allowed to view the tapes of the victim's interviews in their unredacted form, that the physician's entire unredacted report be introduced into evidence, that prior bad acts evidence be admitted, and that counsel read the prepared opening statement. In each instance defendant acknowledged that he was acting against the advice of counsel and that he understood the consequences of allowing the evidence to be admitted. By specifically agreeing to these matters, defendant has waived his right to allege error on appeal. See *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Moreover, defendant's actions created the results he now challenges as error on appeal. A party cannot create error and then challenge that error on appeal. *People v Szalma*, 487 Mich 708, 726; 790 NW2d 662 (2010).

However, unlike the above assertions of ineffective assistance of counsel, defendant did not expressly agree that his interview with Detective Sergeant Mark Pendergraff be played before the jury. During the interview, Pendergraff made irrelevant comments that vouched for the victim's credibility. Such statements were inadmissible. See *People v Musser*, 494 Mich 337, 359-360; 835 NW2d 319 (2013). Nevertheless, overwhelming evidence inculpated defendant. The victim testified in detail regarding defendant's offenses. During the recorded telephone call, defendant apologized, on multiple occasions, for having sexual intercourse with the victim. Moreover, Dr. Guertin's physical findings corroborated the victim's allegations of sexual abuse. As such, defendant has not established that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Frazier*, 478 Mich at 243.

III. SENTENCING

Next, defendant argues that the trial court erred by scoring Offense Variable (OV) 7 at 50 points. Defendant contends that the record does not support a scoring of OV 7, and that the victim's testimony that defendant told her not to tell anyone because it would hurt her brother and sister, as pointed out by the prosecution at sentencing, does not support a finding that defendant engaged in conduct designed to substantially increase the fear and anxiety the victim suffered during the offenses.

We review for clear error the trial court's factual findings under the sentencing guidelines; those findings must be supported by a preponderance of the evidence. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). We review de novo the application of the facts to the law. *Id*.

MCL 777.37 sets forth the scoring of OV 7 and, in pertinent part, directs the trial court to score 50 points if: "(a) A victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense[.]" When evaluating whether a defendant's conduct was designed to substantially increase the fear and anxiety a victim suffered during the offense, a trial court must consider: (1) whether the defendant engaged in conduct beyond the minimum required to commit the offense; and, if so, (2) whether the conduct was intended to make a victim's fear or anxiety greater by a considerable amount." *Hardy*, 494 Mich at 443-444. Conduct that warrants the scoring of 50 points under OV 7 is not limited to actual physical abuse. *People v Mattoon*, 271 Mich App 275, 277-278; 721 NW2d 269 (2006). A threat of future harm may warrant scoring OV 7 at 50

points. *People v McDonald*, 293 Mich App 292, 298-299; 811 NW2d 507 (2011). "[A] defendant does not have to verbalize his intentions for a judge to find that the defendant's conduct was designed to elevate a victim's fear or anxiety. Rather, a court can infer intent indirectly by examining the circumstantial evidence in the record that was proven by a preponderance of the evidence." *Hardy*, 494 Mich at 345, n 26.

Here, the trial court scored OV 7 based on "the trial testimony," which the court noted was "replete with the statements of the testimony of the victim here to support OV-7 scoring at 50, and I don't think I need to expand any further on it. The record is already here, it was a jury trial."

Initially, we note that because defendant's convictions under MCL 750.520b(1)(a) carried a mandatory minimum sentence of 25 years, see MCL 750.520b(2)(b), the guidelines did not apply to these sentences. MCL 769.34(5). Defendant appears to challenge the trial court's scoring decision with regard to his two concurrent sentences for his convictions under MCL 750.520b(1)(b)(*i*).

This case presents a close question whether a preponderance of the evidence supports a finding that defendant engaged in conduct designed to substantially increase the fear and anxiety the victim suffered "during the offense[s]" for purposes of scoring OV 7. The relevant subject offenses entail defendant's convictions of MCL 750.520b(1)(b)(*i*), wherein he sexually penetrated the victim after she had turned thirteen years of age. We conclude that in order to evaluate defendant's intentions, his conduct must be considered in context, including the history of his interactions with the victim. The victim testified regarding several of the "over a hundred" times when defendant, her stepfather, sexually assaulted her. His actions progressed from touching her vagina, to digitally penetrating her, to oral sex and vaginal penetration. Early on during the abuse defendant told the victim not to tell anyone because "it would hurt [her] little brother and sister"—who were her half-siblings and defendant's biological children. The victim testified that she kept the abuse a secret because she did not want to hurt her little brother and sister. She was young, "really scared," and "didn't understand what was happening very well." When defendant put his penis in her vagina for the first time, she started to cry, but he did not stop. On one occasion, defendant came home "pretty drunk" and he was "really forceful." He told her to take off her pants and underwear and he pushed her onto the bed, causing her head to hit the wall, after which he sexually penetrated her. She specifically recalled the incident because of how violent it was.[2] Yet she kept his abuse a secret. On another occasion, defendant used the victim's desire to become a cheerleader to shame or coerce her into having sex with him. After her mother and defendant had separated, the victim, then thirteen years of age, accompanied her younger siblings to defendant's apartment for visitation because her little sister wanted her to and because she was concerned for her siblings' safety at the hands of defendant. Defendant slept in the same bedroom as the victim and vaginally penetrated her at least two more

[2] When testifying outside the presence of the jury, the victim testified that during this incident defendant pushed her up against the wall. When he put his penis in her vagina she started crying, but defendant kept having sex with her.

times during these visits. We conclude that in light of defendant's treatment of the victim, a preponderance of evidence supports a finding that he engaged in conduct designed to substantially increase her fear or anxiety during the subject offenses because he intentionally manipulated her during each sexual encounter, including the subject offenses, and instilled in her both fear and anxiety that harm would come to her siblings if she refused his actions or revealed his sexual abuse to others. Defendant's intentional conduct considerably elevated the victim's fear and anxiety during the offenses such that she did not dare fight him off, cry out for help, or do anything that might expose her siblings to physical or sexual harm. See *Hardy*, 494 Mich at 441.

Affirmed.

/s/ Stephen L. Borrello
/s/ Deborah A. Servitto
/s/ Jane M. Beckering